Supreme Court, U.S.
FILED

(1) 96 358 SEP 5 1996

No. OFFICE OF THE CLERK

In The Supreme Court of the United States

October Term, 1996

Norfolk and Western Railway Company,
Petitioner,

v.

James L. Chittum,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Virginia

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PETITION FOR A WRIT OF CERTIORARI

Carter G. Phillips *
Nathan C. Sheers
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Petitioner

* Counsel of Record

September 5, 1996

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

33 pp

QUESTION PRESENTED

Whether the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, as interpreted by this Court in *Norfolk & Western Railway* v. *Liepelt*, 444 U.S. 490 (1980), requires state courts to permit the admission of evidence on the issue of damages demonstrating that future income streams would have been reduced by the payment of compulsory federal railroad retirement taxes on income.

LIST OF PARTIES AND RULE 29.6 DISCLOSURE STATEMENT

The only parties to this proceeding are the petitioner Norfolk and Western Railway Company and the respondent James L. Chittum.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Norfolk and Western Railway Company states that it is a subsidiary of the Norfolk Southern Railway Company, which in turn is a subsidiary of the Norfolk Southern Corporation.

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Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Virginia

---

PETITION FOR A WRIT OF CERTIORARI

Norfolk and Western Railway Company hereby petitions for a writ of certiorari to review the judgment of the Supreme Court of the Commonwealth of Virginia in this case.

OPINIONS BELOW

The opinion of the Virginia Supreme Court is reported at 468 S.E.2d 877 (Va. 1996) and is included in the Appendix at 1a-9a. The opinion of the Virginia Supreme Court denying rehearing is not reported and is included in the Appendix at 10a.

JURISDICTION

The decision of the Virginia Supreme Court was entered on April 19, 1996. Norfolk and Western Railway Company petitioned for rehearing. The Virginia Supreme Court denied the petition on June 7, 1996. The juris-

diction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

The Federal Employers' Liability Act provides, in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of . . . such carrier, or by reason of any defect or insufficiency, due to its negligence, in its [equipment].

45 U.S.C. § 51.

The Railroad Retirement Tax Act provides, in pertinent part:

> **Rate of Tax**
>
> **(a) Tier 1 tax.**—In addition to other taxes, there is hereby imposed on the income of each employee a tax equal to the applicable percentage of the compensation received during any calendar year by such employee for services rendered by such employee. For purposes of the preceding sentence, the term "applicable percentage" means [7.65%] under sub-

sections (a) and (b) of section 3101 for the calendar year.

(b) Tier 2 tax.—In addition to other taxes, there is hereby imposed on the income of each employee a tax equal to 4.90 percent of the compensation received during any calendar year by such employee for services rendered by such employee.

26 U.S.C. § 3201.

STATEMENT

A. Factual Background

Respondent James Chittum, an employee of petitioner Norfolk and Western Railway Company, began working as a track laborer in June 1973. R. 298.[1] Later that year, Chittum was involved in a hunting accident in which he suffered a gunshot wound to the abdomen and spine. R. 299. As a consequence, Chittum was temporarily rendered paraplegic and underwent five years of rehabilitation. R. 300. Chittum eventually returned to work for Norfolk and Western, though he suffered from various neurological symptoms. R. 303. In 1981 Chittum stepped on a nail, but because of numbness in his foot did not discover the nail until he removed his boot at the end of the work day. Appellee's Br. in Va. S. Ct. at 1. Chittum attempted to care for the puncture wound himself, but the wound became infected and Chittum was hospitalized and required a skin graft on his heel. R. 307.

Chittum returned to work in 1982, R. 308, and performed a variety of jobs, R. 322. In 1989, after a fall at home, Chittum was pulled out of service on the railroad until he received medical clearance to resume working. R. 323. Chittum enlisted the services of a neurologist and, based on the doctor's medical report that

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[1] "R. ——" refers to the Joint Appendix filed with the Virginia Supreme Court.

Chittum would be "able to function quite well," R. 640-41, Chittum was allowed to resume work, this time as a painter's helper. R. 328. Shortly thereafter, Chittum began having trouble with his skin graft. R. 481. Again, he attempted to treat the problem himself before finally consulting a doctor. In 1991, Chittum again suffered a tear in the skin graft but he still tried to treat it himself while continuing to work. R. 355-56. This time, however, surgery was required to replace the skin graft, R. 389, and Chittum was never authorized by a physician to return to work. R. 392. In 1993, after three appeals, the Railroad Retirement Board awarded Chittum a disability and retirement annuity. R. 393-95.

B. The Federal Employers' Liability Act

The Federal Employers' Liability Act of 1908 ("FELA") governs liability for work-related injuries to railroad employees caused by their employers' negligence. See 45 U.S.C. § 51 *et seq.* FELA established a comparative fault standard of liability and eliminated the common law tort defense of assumption of risk. See 45 U.S.C. §§ 53-54. Pursuant to FELA, a railroad employee injured on the job may bring a negligence action for damages in state or federal court against his or her employer.[2] See 45 U.S.C. §§ 51, 56. Employers are liable in damages for "such injury or death resulting in whole or in part from the negligence of [the railroad] or by reason of any defect or insufficiency, due to its negligence," in various pieces of equipment. 45 U.S.C. § 51. Under this remedial scheme, plaintiffs are entitled to recover "the damages . . . [that] flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received." *Norfolk & W. Ry.* v. *Liepelt*, 444 U.S. 490, 493 (1980) (citation and internal quotation

[2] This Court has held that FELA provides the exclusive remedy for railroad employees injured in interstate commerce. *See New York Cent. R.R.* v. *Winfield*, 244 U.S. 147 (1917).

marks omitted). Thus, a disabled employee injured by the employer's negligence is entitled to lost wages.

C. Railroad Retirement Taxes

Pursuant to the Railroad Retirement Act of 1974 ("RRA"), codified at 45 U.S.C. § 231 *et seq.*, eligible railroad employees are entitled to receive retirement and disability annuities. See 45 U.S.C. § 231a(a)(1). The Railroad Retirement Board awards these annuities from the Railroad Retirement Account (the "Account"). See 45 U.S.C. § 231f(c)(1). The Account is funded by "Tier 1" and "Tier 2" taxes paid by employers and employees ("railroad retirement taxes") in accordance with the provisions of the Railroad Retirement Tax Act ("RRTA"). See 26 U.S.C. §§ 3201, 3221; 45 U.S.C. § 231n(a). Employees pay a tax "imposed on the[ir] income" and employers pay an "excise" tax based on the compensation paid to their employees. 26 U.S.C. §§ 3201, 3221. Currently, employees pay 7.65% of their income as Tier 1 taxes and 4.9% of their income as Tier 2 taxes. See 26 U.S.C. § 3201.[3] These taxes are automatically withheld from the employee's paycheck. See 26 U.S.C. § 3202(a).

D. Proceedings Below

In 1992, respondent filed a FELA action against Norfolk and Western in the Circuit Court for the City of Roanoke, Virginia, claiming that petitioner had been negligent in allowing him to continue working in such a manner that his skin graft was destroyed. R. 1-4.[4] At trial, respondent introduced evidence of his work-life

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[3] Under 26 U.S.C. § 3231(e)(2)(B) the railroad worker's compensation subject to taxation is limited to an applicable base salary as determined under the Social Security Act, 42 U.S.C. § 430, currently $62,700. That capping provision is not applicable in this case.

[4] Petitioner does not present any question concerning liability in this petition for certiorari. The only issue presented concerns the proper calculation of damages.

expectancy and annual earnings in order to demonstrate his estimated lost future income stream. The trial court, however, both *in limine* and during the trial, refused to allow Norfolk and Western to present evidence that Chittum's stream of future income would have been discounted by the amount of railroad retirement tax that would have been deducted from his paycheck pursuant to the RRTA. R. 459-61 ("We have discussed *Liepelt* extensively"). The jury then awarded Chittum $300,000.

On appeal, the Virginia Supreme Court affirmed the trial court. At the end of its opinion, the state supreme court summarily dismissed Norfolk and Western's primary contention on appeal that this Court's opinion in *Norfolk & Western Railway* v. *Liepelt*, 444 U.S. 490 (1980), required the trial court to admit petitioner's evidence concerning the effect of railroad retirement taxes on Chittum's future income stream. App. 8a-9a. The Virginia Supreme Court, ignoring the plain reasoning of *Liepelt*, narrowly limited that decision to apply only to "income taxes" and excused the error of the trial court by concluding that it "d[id] not equate [railroad retirement taxes] with income taxes." App. 8a.

REASONS FOR GRANTING THE PETITION

The decision of the Virginia Supreme Court raises a significant question with respect to the uniform interpretation of future income damage calculations under the Federal Employers' Liability Act and similar federal remedial statutes. The decision below, refusing to permit the adjustment of a future income stream in order to arrive at a more "realistic measure" of the plaintiff's income and prevent the "overcompensati[on]" of the plaintiff, *Liepelt*, 444 U.S. at 493, 498, squarely conflicts with the holding of another state's appellate court, *Oltersdorf* v. *Chesapeake & Ohio R.R.*, 404 N.E.2d 320 (Ill. App. Ct.), *appeal denied* (Ill. Sept. 29, 1980), *cert. denied*, 450 U.S. 920 (1981), and is flatly inconsistent with the

principles enunciated by this Court and the lower federal courts, both with respect to FELA and to similar federal remedial statutes enacted to provide uniform coverage to protected classes of workers. Review by this Court is warranted to ensure uniformity in determining the proper measure of damages in FELA cases.

This Court has held that the need for uniform national policy renders the calculation of damages pursuant to FELA a substantive issue of federal law. *Monessen Southwestern Ry.* v. *Morgan*, 486 U.S. 330, 335 (1988). Nevertheless, many state courts, including the court below, have refused to comply with federal law and policy with respect to the proper subtraction of payroll taxes, such as social security and the railroad retirement tax at issue in this case, in determining future income streams. Compare *Madore* v. *Ingram Tank Ships, Inc.*, 732 F.2d 475, 478-79 (5th Cir. 1984) with *Marynik* v. *Burlington N., Inc.*, 317 N.W.2d 347, 350-51 (Minn. 1982) (refusing to deduct income tax or railroad tax from future income stream under FELA). Workers and employers now receive highly variable treatment in the calculation of federal damages awards depending upon the forum in which the calculation is made.

Moreover, the issue of how to calculate damage awards properly in order to compensate claimants for lost future income streams annually affects thousands of railroad workers and dozens of interstate railroads and involves millions of dollars in unnecessary "compensatory" expenses. There currently are 213,000 employees in the freight railroad industry, see *AAR to Congress: "Let's Get Acquainted,"* Railway Age, March 1995, at 12, and while injuries to railroad employees have been more than halved in the last decade, FELA lawsuits have more than doubled and now number in the thousands each year. See 1985-1995 AAR Claim & Litigation Reports (5,788 FELA suits filed in 1995); see also *Hearing Before the Subcomm. on Transportation and*

Hazardous Materials of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. 44 (1989) (statement of William H. Dempsey). In 1995, the railroad industry paid out $886 million in FELA claims, or 2.52% of gross operating revenues. See 1995 AAR Claim & Litigation Report; see also House hearing, *supra,* at 47-48. Permitting some courts to ignore the effect of railroad retirement taxes on future income streams, thereby overcompensating FELA claimants, has a substantial, detrimental effect on the railroad industry. In addition, it undermines the remedial policies underlying FELA and destroys the uniform application of federal law. For these reasons, review by this Court is both appropriate and necessary.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS REQUIRING THE USE OF NET, AFTER-TAX INCOME FOR THE CALCULATION OF LOST INCOME STREAMS, AS WELL AS THE DECISION OF THE APPELLATE COURT OF ILLINOIS.

This Court has repeatedly articulated the principle that an injured plaintiff, suing under the remedial FELA scheme, is entitled to recover compensation for "the damages . . . [that] flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received." *Liepelt,* 444 U.S. at 493 (citation and internal quotation marks omitted). This Court held that FELA claimants were entitled to a recovery based on the "realistic measure" of their future income, which, because "[t]he amount of money that a wage earner is able to contribute to the support of his family is unquestionably affected by the amount of the tax he must pay to the Federal Government," is to be calculated from "after-tax income, rather than his gross income." *Id.* In *Liepelt,* the Appellate Court of Illinois had affirmed a state trial court's decision prohibiting the introduction of evidence showing how much income tax the claimant would have paid from his projected gross income. This Court re-

versed, holding that the evidence should have been presented in order to prevent "overcompensating the plaintiff." *Id.* at 498 (citation and internal quotation marks omitted).

In *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U.S. 523 (1983), this Court affirmed these principles in a decision involving an analogous statutory scheme. In *Pfeifer*, a case arising under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), the Court, relying on *Liepelt*, held that not only income taxes but any avoided costs (including such items as the purchase of uniforms) should be deducted from a claimant's estimated lost income stream. *Pfeifer*, 462 U.S. at 534; see also *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 487 n.17 (1981) ("[n]one of the Court's reasoning [in *Liepelt*] was directed particularly at FELA"). Accordingly, this Court consistently has required trial courts to allow factfinders to hear evidence regarding deductions to gross future income streams in order to ensure that damage awards fully reimburse employees for their lost earning power, but do not "lead to the plaintiff recovering a windfall award." *Id.* at 486 n.16. *Cf. Rachel* v. *Consolidated Rail Corp.*, 891 F. Supp. 428, 431 (N.D. Ohio 1995) ("[Plaintiff's expert] may not . . . include in his calculation future Tier I or Tier II payments") (emphasis omitted).

The decision of the Virginia Supreme Court artificially limiting this Court's holdings to deductions for self-described "income taxes," App. 8a-9a, is flatly inconsistent with the clear import of these decisions. This Court has held that deductions under the Railroad Retirement Tax Act are, in fact, "[c]ompulsory federal taxes" on income. *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 582 (1979). The RRTA itself clearly imposes the tax "on the income of each employee." 26 U.S.C. § 3201. In any event, it is undisputed that Chittum's net income was reduced by 12.55% by these mandatory federal railroad

retirement taxes prior to his injury. This significant reduction in gross wages simply cannot be ignored in arriving at any realistic measure of his lost future income stream. Regardless of whether these taxes are "income taxes," permitting Chittum to recover for railroad retirement taxes that he will never have to pay results in his overcompensation just as surely as allowing him to recover for the specific taxes at issue in *Liepelt*. Because the Virginia Supreme Court's decision improperly refusing to consider any deduction from future income streams other than narrowly defined "income taxes" will continue to affect myriad FELA damage calculations, this Court should review the decision below.

The decision of the Virginia Supreme Court is also directly in conflict with the holding of the Appellate Court of Illinois on this very issue. In *Oltersdorf* v. *Chesapeake & Ohio R.R.*, 404 N.E.2d 320 (Ill. App. Ct.), *appeal denied* (Ill. Sept. 29, 1980), *cert. denied*, 450 U.S. 920 (1981), an injured railroad worker brought suit under FELA. At trial, the court refused to permit the railroad company to offer any evidence of the impact of taxation on the plaintiff's lost future gross earnings. The Appellate Court of Illinois, unlike the Virginia Supreme Court, correctly applied this Court's decision in *Liepelt* (which had originated in that court), and reversed, holding that the trial court erred in excluding evidence demonstrating the impact of the railroad retirement taxes on the injured railroad worker's future income stream. *Id.* at 324-25. Because this important and recurring question of the proper treatment of railroad retirement taxes in calculating future income streams has been resolved in conflicting ways by the courts of different states, the decision below should be reviewed by this Court.

II. THE DECISION BELOW IS INCONSISTENT WITH THE DECISIONS OF NUMEROUS FEDERAL COURTS REQUIRING THE DEDUCTION OF SOCIAL SECURITY TAXES IN ORDER TO CALCULATE LOST FUTURE INCOME STREAMS UNDER ANALOGOUS STATUTORY SCHEMES.

This Court has held that conflicting interpretations of analogous statutory schemes is an issue worthy of this Court's review. See, *e.g.*, *Begier* v. *IRS*, 496 U.S. 53, 57 n.2 (1990). The decision of the Virginia Supreme Court is flatly inconsistent with the approach adopted by numerous decisions of the federal courts of appeals and one state court with respect to Social Security taxes under analogous federal remedial statutes, such as the Jones Act and the LHWCA.

As this Court has held, " '[t]he Railroad Retirement Act is substantially a Social Security Act for employees of common carriers.' " *Eichel* v. *New York Cent. R.R.*, 375 U.S. 253, 254 (1963) (per curiam) (quoting *New York, N.H. & H.R. Co.* v. *Leary*, 204 F.2d 461, 468 (1st Cir.), *cert. denied*, 346 U.S. 856 (1953)). Employees eligible for total disability benefits under the RRA receive the same annuity that they would receive under the Social Security Act ("SSA"). See 45 U.S.C. § 231b (a)(1). Moreover, the RRA provides that any individual's railroad annuity may be reduced by the amount of any Social Security benefit. See 45 U.S.C. § 231b(m). If a railroad employee leaves industry employment, the funds contributed to the RRA pension and disability account on behalf of the employee are transferred to Social Security. See 45 U.S.C. § 231f(c)(2). RRA annuity determinations likewise are made with reference to the SSA. See generally 45 U.S.C. § 231a (incorporating SSA definitions of "retirement age," "widow," and "divorced wife"). Railroad retirement tax benefits, "[l]ike Social Security, and unlike most private pension plans . . . are not contractual," and, thus, "Congress may alter, and even eliminate, them at any time."

Hisquierdo, 439 U.S. at 575. In sum, the RRA's pension and total disability annuities are essentially equivalent to those of the Social Security Act.[6] Accordingly, precedents concerning the appropriateness of deducting social security taxes from calculations of future income streams under analogous federal remedial statutory schemes are logically indistinguishable in the FELA context.

The Virginia Supreme Court refused to consider any precedents that were not decided under FELA. App. 8a-9a. As a result, the Virginia Supreme Court ignored the close historical relationship between many federal remedial statutes as well as the similarities between railroad retirement and Social Security taxes. In particular, FELA and the Jones Act, the federal remedial statute governing employer liability to seamen, are more than merely analogous; they are inextricably bound together by their legislative and judicial history. *American Dredging Co.* v. *Miller*, 114 S. Ct. 981, 989-90 (1994). This Court has repeatedly recognized, as does the statute itself, that the Jones Act is based upon FELA, and incorporates by reference FELA's modification and extension of common law rights and remedies for covered workers. *Id.* (citing *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 439 (1958)); 46 U.S.C. § 688(a). The Jones Act adopts "the entire judicially developed doctrine of liability" under FELA, *Kernan*, 355 U.S. at 439, and provides identical remedies to its workers, *Miller*, 114 S. Ct. at 989.

Other federal remedial statutory schemes also are manifestly similar to FELA. The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*,

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[6] Similar parallels exist between the RRTA and the Federal Income Contribution Act ("FICA"). *See* Janet Spragens, *Tax Cases of the Federal Circuit in 1994*, Am. U. L. Rev. 2201, 2207 (1995) (both RRTA and FICA contributions are split between employer and employee); *New Decisions: Final Regulations Continue Existing Definition of RRTA Compensation*, 82 J. Tax'n 144 (1995) (compensation for RRTA purposes is determined with reference to FICA definition of "wages").

and the Death on the High Seas Act ("DOHSA"), 46 U.S.C. app. § 761 *et seq.*, both permit injured parties to sue for compensation where their claims might otherwise be barred or impeded by the common law of torts. 33 U.S.C. § 905(b); 46 U.S.C. app. § 766.

Under each of these closely parallel statutory schemes, all federal courts of appeals to address the issue, as well as one state court, have held that this Court's decision in *Liepelt* mandates the admission of evidence with respect to the effect of Social Security taxes on a plaintiff's lost income stream. See *Rachal* v. *Ingram Corp.*, 795 F.2d 1210, 1218 (5th Cir. 1986) (social security taxes must be subtracted from future income stream under Jones Act); *Madore* v. *Ingram Tank Ships, Inc.*, 732 F.2d 475, 478-79 (5th Cir. 1984) (same); *Hernandez* v. *M/V Rajaan*, 841 F.2d 582, 587-88 & nn.2-3 (5th Cir.) (subtracting social security taxes from future income stream under LWHCA), *other section of opinion corrected*, 848 F.2d 498 (5th Cir.), *cert. denied sub nom. Daniella Shipping Corp.* v. *Hernandez*, 488 U.S. 981 (1988); *Escobar* v. *Seatrain Lines, Inc.*, 573 N.Y.S.2d 498, 502 (N.Y. App. Div. 1991) (same); *Tallentire* v. *Offshore Logistics, Inc.*, 754 F.2d 1274 (5th Cir. 1985), *rev'd on other grounds*, 477 U.S. 207 (1986), *aff'd in relevant part on remand*, 800 F.2d 1390, 1392 (5th Cir. 1986) (subtraction of social security taxes proper under DOHSA).[6] There simply is no justification for treating taxes supporting annuities under these statutory schemes any differently from the railroad retirement taxes that fund railroad worker annuities and are automatically deducted from their gross incomes.

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[6] Under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10, which supplants the common law and provides compensation to individuals suffering from vaccine-related injuries, the Federal Circuit also has held that social security taxes must be deducted from future income streams in order to prevent overcompensation. *Euken* v. *Secretary of Dep't of Health & Human Servs.*, 34 F.3d 1045, 1047-48 (Fed. Cir. 1994).

This Court has repeatedly held that the need for a uniform national compensation policy renders the calculation of damages pursuant to FELA, the Jones Act, and other analogous statutes a matter of substantive federal law. *Monessen Southwestern Ry.* v. *Morgan*, 486 U.S. 330, 335 (1988); see also *Liepelt*, 444 U.S. at 493 n.5 ("One of the purposes of [FELA] was to 'create uniformity . . .' with respect to railroads' financial responsibility for injuries to their employees") (quoting H.R. Rep. No. 1386, 60th Cong., 1st Sess. 3 (1908)). Decisions such as the one rendered by the Virginia court below, however, show that some state courts have refused to adhere to FELA's policies and this Court's precedents. For instance, in *Marynik* v. *Burlington Northern, Inc.*, 317 N.W.2d 347, 351 (Minn. 1982), the Minnesota Supreme Court held it was harmless error for the trial court to refuse admission of any evidence regarding the effect of income and railroad retirement taxes on plaintiff's future income stream. The Minnesota court reasoned that it would be too difficult for the jury to calculate the plaintiff's tax. *Id.* This argument, however, was expressly rejected by the Court in *Liepelt* because "the trial bar and the trial bench ha[ve] developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries." 444 U.S. at 494.

The refusal of the Virginia Supreme Court to recognize and defer to FELA's scheme of compensation destroys the uniformity which Congress intended for this federal remedial statute. Congress intended injured workers to be made whole no matter where their case might be heard. See H.R. Rep. No. 1386, 60th Cong., 1st Sess. 3 (1908). This Court's decision in *Liepelt* regarding the effect of taxation and other deductions on the calculation of damage awards has become a "federal common law rule," *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473 (1981), designed to ensure that plaintiffs are treated fairly, but not overcompensated. *Id.* at 487. The rail-

roads' financial responsibility has been expanded significantly by the Virginia Supreme Court, however, extending far *beyond* the federal duty to compensate its injured employees fairly. The decision below not only guarantees that railroad workers will be treated differently in different states, but also unjustly burdens railroad companies whose employees bring FELA claims against them in Virginia courts. Because the disparate impact on the calculation of damage awards, both in Virginia and other states refusing to apply federal law in calculating FELA damages, will continue to affect detrimentally significant numbers of FELA claims and will bias the remedial effect of FELA toward overcompensating claimants, this case presents a significant question of federal law warranting this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS *
NATHAN C. SHEERS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Petitioner

September 5, 1996

* Counsel of Record

APPENDIX A

FROM THE CIRCUIT COURT
OF THE CITY OF ROANOKE
Clifford R. Weckstein, Judge

Record No. 951428

NORFOLK AND WESTERN RAILWAY COMPANY

v.

JAMES L. CHITTUM

April 19, 1996

OPINION BY

JUSTICE ROSCOE B. STEPHENSON, JR.

Present: All the Justices

The principal issue we consider in this appeal is whether the evidence is sufficient to support a verdict in favor of the plaintiff. We also consider whether the trial court erred in refusing to deduct the plaintiff's pension contributions in calculating his net income.

I

Plaintiff, James L. Chittum, filed a motion for judgment under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (the Act or FELA), against his employer, Norfolk and Western Railway Company (N & W), seeking recovery of damages for personal injuries allegedly caused by N & W during the course of his employ-

ment. N & W denied liability, and a jury trial ensued. The jury returned a verdict in favor of Chittum in the amount of $300,000, and the trial court entered judgment thereon. N & W appeals.

II

Chittum prevailed at trial; therefore, we must view the evidence and all reasonable inferences drawn therefrom in the light most favorable to him. Chittum commenced working for N & W in June 1973 as a laborer, repairing railroad tracks. In December 1973, Chittum was shot in a hunting accident, and the bullet lodged in his spine, rendering him paraplegic. He gradually recovered, however, and, in 1978, after an evaluation and release by N & W's own doctor, he returned to his previous work.

Chittum, however, experienced some residual physical limitations, including a medical condition known as "foot drop" and chronic leg and back pain. He also walked with a limp. With the aid of metal foot and ankle supports attached to his shoes, however, Chittum was able to work regularly until 1981, when a nail punctured the heel of his right shoe.

Chittum tried to treat the wound himself, but it would not heal. He then came under the care of Dr. Young S. Kang, a plastic and reconstructive surgeon. In August 1981, Dr. Kang performed a split thickness skin graft on Chittum's right heel.

In January 1982, Dr. Kang released Chittum to return to work, and Chittum reported to N & W's terminal supervisor and advised him about the skin graft. N & W then sent Chittum to a local hospital for a fitness-for-duty examination by a Dr. Watts, the physician regularly used by N & W for such examinations. Following the examination, Dr. Watts released Chittum to return to work

without any restrictions, and Chittum returned to work the next day.[1]

In October 1989, Chittum was required to work on and around piles of railroad spikes in N & W's roadway materials yard. His work involved opening kegs containing spikes and dumping the spikes from the kegs onto the ground so the spikes could be salvaged for further use. While working there, Chittum tore the skin graft when he twisted his right foot on some spikes.

Initially, Chittum treated himself as Dr. Kang had taught him to do. In April 1990, however, he returned to Dr. Kang. The doctor prescribed an arch support to take the weight off Chittum's heel, and Chittum obtained the support and returned to work. In April 1991, Chittum again tore the skin graft slightly while working on the spike pile.

Chittum told Gary Obenchain and L.P. Porter, two of his supervisors, that working on the spike job was hurting him. None of his supervisors, however, did anything about his complaint or told him to stop working.

Chittum's condition worsened, and, on June 4, 1991, he returned to Dr. Kang. The doctor noted that the original skin graft had deteriorated sufficiently to require a new surgical procedure.

The day after Chittum's June 4, 1991 visit with Dr. Kang, Chittum told Obenchain that he was going to have further surgery relating to the skin graft on his right heel. Chittum also told Linwood Crenshaw, another supervisor, of his impending surgery. No one, however, told Chittum to stop working, and Chittum continued to work until June 17, 1991, when he tore the skin graft a third time. Dr. Watts then ordered that Chittum be taken out of service.

Dr. Kang performed the second surgery in two stages in June and July 1991. Chittum was never released to

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[1] The record also discloses that Dr. Watts examined Chittum's foot in August 1989.

return to work, and N & W concedes that Chittum is not physically qualified to do so.

III

N & W contends that the trial court erred in permitting Chittum to prevail on his claim of initial injury and subsequent aggravations thereof "where there was no evidence that [N & W's] alleged negligence played any role in [Chittum's] October, 1989 injury." N & W asserts that "[s]ince there was *no* evidence as to the real cause of [Chittum's] October, 1989 injury, the jury was left to speculate improperly and impermissibly as to what had caused the injury."

According to N & W, "[t]he evidence is *uncontroverted* that at the time of his injury in October, 1989, [Chittum] was working as a painter's helper with a Bridge and Building Gang [, and] [t]he duties of a painter's helper did *not* require him to open spike kegs or walk over spikes." N & W bases this conclusion on certain answers Chittum gave during his cross-examination.

During the cross-examination, N & W's counsel confronted Chittum with certain N & W documents which indicated that Chittum was not working in the roadway materials yard during October 1989. When confronted with these documents, Chittum agreed "as far as [the documents] show." [2] On redirect examination, however,

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[2] Based on the documents and Chittum's answers during cross-examination, N & W also contends that there was a fatal variance between Chittum's allegations in his motion for judgment and his proof. N & W advanced this contention in the trial court during its post-verdict argument. The trial court rejected the contention, reasoning that it had not been made at trial "in such a manner as to call to the attention of the trial judge . . . and [Chittum's] lawyer . . . the fact that [the] argument was made." We agree with the trial court.

N & W's counsel, at one time during the trial, did state that "the allegations . . . in the pleadings . . . are just simply wrong. They have identified incidents that are not possible to have hap-

Chittum testified that, despite what the documents indicated, he first tore the skin graft while working in "the railway material yard."

N & W, in asserting its contention, relies upon the doctrine, established in *Massie* v. *Firmstone*, 134 Va. 450, 462, 114 S.E. 652, 656 (1922), that a litigant is bound by his own factual statements. The doctrine, however, does not apply "to an adverse statement standing in isolation from the litigant's testimony as a whole." *Baines* v. *Parker and Gladding*, 217 Va. 100, 105, 225 S.E.2d 403, 407 (1976). Consequently, "[a] damaging statement made in one part of [a litigant's] testimony must be considered in the light of an explanation of such statement made in a later part of his testimony. . . . And it is generally for the jury to determine whether it will accept such explanation or clarification." *VEPCO* v. *Mabin*, 203 Va. 490, 494, 125 S.E.2d 145, 148 (1962).

In the present case, Chittum's damaging statement made in one part of his testimony cannot be viewed in isolation from his later testimony. The jury resolved this conflict in the evidence in Chittum's favor, and we conclude that the trial court properly rejected N & W's contention.

IV

N & W further contends that Chittum produced insufficient evidence of foreseeability to create a jury issue on the question of negligence. N & W asserts that "there is no evidence that [it] was on notice that allowing Chittum to do spike reclamation put his skin graft at risk."

An essential ingredient of negligence under the Act is reasonable foreseeability of harm to the employee. *Norfolk and Western Railway Co.* v. *Johnson*, 251 Va. 37, 43-44, 465 S.E.2d 800, 805 (1996). However, an em-

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pened because of the time frame and where . . . Chittum was working." We do not think, however, that this statement raised the issue of a fatal variance "with reasonable certainty." Rule 5:25.

ployer need not foresee the particular consequences of its negligent acts; rather, it must compensate its employee "for even the improbable or unexpectedly severe consequences of [its] wrongful act." *Gallick* v. *Baltimore & Ohio R.R.*, 372 U.S. 108, 120-21 (1963).

When the evidence in the present case is viewed in light of the foregoing principles of law, we conclude that the jury reasonably could have found that the injury Chittum sustained was reasonably foreseeable. Chittum testified that a N & W claim agent and a N & W supervisor came to his home and saw his right heel while he was recuperating from the 1981 skin graft operation. Chittum complained to his supervisors, Obenchain and Porter, about having to work on the spike pile. N & W's own physician, Dr. Watts, examined Chittum's skin graft in 1982 and again in 1989 and never recommended any restrictions or limitations regarding the work Chittum could perform. Thus, we reject N & W's contention that it did not have notice of any risk to Chittum. Indeed, "[c]ourts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant* v. *Peoria & P. U. Ry.*, 321 U.S. 29, 35 (1944).

V

N & W also contends that Chittum failed to establish that N & W's alleged negligence was the cause of his injury. N & W asserts that none of Chittum's experts related the breakdown of his skin graft to walking over spikes. N & W further asserts that there is no evidence that its negligence caused the alleged aggravations of the primary injury.

Pursuant to the Act, an employer has a duty to provide its employees with a safe place to work. *Bailey* v. *Central Vermont Ry.*, 319 U.S. 350, 352-53 (1943). The employer also has a nondelegable duty to inspect its

premises and other areas where its employees are required to work and to make reasonable precautions to protect its employees from possible danger. *Cazad* v. *Chesapeake & Ohio Ry.*, 622 F.2d 72, 75 (4th Cir. 1980). Moreover, the employer has a duty "to assign its employees to work for which they are reasonably suited . . . [, and it] breaches that duty if it knew or should have known that its assignment exposed the employee to an unreasonable risk of harm." *Sabb* v. *Norfolk & P. Ry. Co.*, 222 Va. 19, 23, 278 S.E.2d 795, 798 (1981).

The Supreme Court, in establishing the standard under the Act by which a jury may properly determine a causal relationship between an employer's negligence and an employee's injury, stated the following:

> [T]he test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury . . . for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence.

Rogers v. *Missouri Pacific R.R.*, 352 U.S. 500, 506 (1957) (footnotes omitted).

Applying the foregoing principles of law, we conclude that the evidence in the present case, when viewed in the light most favorable to Chittum, is sufficient to support the jury's finding that N & W was negligent in failing to provide Chittum with a safe place to work. From the testimony of Chittum and several of his co-workers, as well as various photographs depicting the area where Chittum was required to work, the jury reasonably could have found that N & W knew, or should have known, that Chittum's work assignment exposed him to an unreasonable risk of harm.

We also conclude that the evidence supports the jury's finding that N & W's negligence played a part in produc-

ing the primary injury in October 1989 and the aggravations thereof in April and June 1991. Although much of the expert testimony reasonably could have produced a different result, Chittum's own testimony was sufficient to create a jury issue regarding causation. As we have said, " 'even when medical testimony fails to establish causal connection expressly,' " a plaintiff's testimony alone is sufficient to create a jury issue regarding causation. *Todt* v. *Shaw*, 223 Va. 123, 126-27, 286 S.E.2d 211, 213 (1982) (quoting *Peterson* v. *Neme*, 222 Va. 477, 483, 281 S.E.2d 869, 872 (1981)).

VI

Finally, N & W contends that the trial court erred in ruling that, for purposes of calculating Chittum's net wages under the Act, Tier I and Tier II retirement payments made by Chittum should not be deducted from his gross wages. N & W relies in large part on *Norfolk & W. Ry.* v. *Liepelt*, 444 U.S. 490 (1980). In *Liepelt*, a wrongful death action brought under the Act, the Supreme Court held that, with respect to the measure of damages, a railway company is entitled to present evidence of the effect of income taxes on the decedent's estimated future earnings. 444 U.S. at 493-94.

The Supreme Court, however, has never held that Tier I and Tier II payments toward retirement are to be treated the same as federal and state income taxes and, therefore, deducted to establish net income. Nevertheless, building upon *Liepelt*, N & W asserts that the retirement payments are congressionally mandated federal taxes and, therefore, like income taxes, should be deducted from gross income in determining damages. We do not agree.

Even though retirement payments are mandated by Congress, we do not equate them with income taxes. Furthermore, N & W has not cited, and we have not found, a single FELA decision from either a federal or a state court holding that such retirement payments should

be deducted from gross income in calculating net income. We conclude, therefore, that the trial court did not err in rejecting N & W's contention.

VII

We find no error in the trial court's rulings. Accordingly, we will affirm the judgment.

Affirmed.

APPENDIX B

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 7th day of June, 1996.

Record No. 951428
Circuit Court No. CL92-000449

NORFOLK AND WESTERN RAILWAY COMPANY,
Appellant,

against

JAMES L. CHITTUM,
Appellee.

UPON A PETITION FOR REHEARING

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 19th day of April, 1996 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ David S. Leach
Clerk

FILED
NOV - 7 1996

No. 96-358

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,
v.
JAMES L. CHITTUM,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Virginia

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

ROBERT W. BLANCHETTE *
Vice President-Law and
General Counsel
DANIEL SAPHIRE
General Attorney
ASSOCIATION OF AMERICAN
RAILROADS
American Railroads Building
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505
Counsel for Amicus

* Counsel of Record

November 7, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

16 pp

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Virginia

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner, Norfolk & Western Railway Company, has consented to AAR's filing of a brief.[1] Respondent, James L. Chittum, has refused consent.

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR seeks to file a brief *amicus curiae* only

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[1] The letter expressing consent has been filed with the Clerk of the Court.

when the case presents an issue of great significance to the railroad industry as a whole—and in those instances such requests have been granted.[2] This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, presents such an issue.

When AAR appears before a court as *amicus curiae* in an FELA case it brings a broad, industry-wide perspective to the issue. This perspective often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole.

Because of its long involvement with FELA, AAR is in an excellent position to address questions arising under that unique statute. AAR conducts an annual survey of the FELA experience of its member railroads, and compiles and maintains the results. This represents, to AAR's knowledge, the most comprehensive database on FELA costs and trends in existence.[3]

AAR works closely with its member roads' litigation counsel on problems associated with FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, a 1200 member organization of attorneys representing railroad companies in personal injury litigation. As a result, AAR is thoroughly familiar with the trends and problems associated with FELA.

AAR has spearheaded railroad industry legislative efforts to bring treatment of railroads in the area of employer liability into conformity with all other industries, which are covered by no-fault workers' compensation

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[2] *E.g., Metro North Commuter R.R. Co. v. Buckley*, 79 F.3d 1337 (2nd Cir.), *cert. granted* Nov. 1, 1996; *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988); *Burlington Northern R.R. v. Oklahoma Tax Commission*, 481 U.S. 454 (1986).

[3] *See* ASSOCIATION OF AMERICAN RAILROADS, CLAIM & LITIGATION REPORT (published annually).

laws. During the course of these efforts, AAR has worked with the shortline and regional railroads, as well as the commuter authorities, all of whom are also governed by FELA, but whose perspectives may be somewhat different from the large freight roads which mostly constitute AAR's membership. Consequently, AAR has become familiar with the impact of FELA on all components of the rail industry.

AAR's primary interest with regard to FELA in the judicial arena is to prevent courts from expanding railroad liability beyond FELA's intent. Lower courts sometimes fail to appreciate that FELA is a unique statute. While FELA's obligation to respond in unlimited damages is unprecedented, and substantial compared to the obligations imposed on other employers, FELA limits employer obligations in some ways that workers' compensation does not. Moreover, the problem is compounded by FELA's liberal venue provision, which affords plaintiffs wide latitude in selecting the site of litigation, as well as the ability to bring and maintain an action in state court. Thus, aberrant state court decisions can have a far reaching impact. So long as Congress continues to keep this regime in place, railroads will avail themselves of their legal rights in an effort to limit their liability, and AAR will support those efforts.

In this case, the lower court, in a ruling that plainly is inconsistent with this Court's decision in *Norfolk & Western Ry. v. Liepelt,* 444 U.S. 490 (1980), has greatly increased railroad liability under FELA. This decision will impact a significant portion of the railroad industry, not just the individual railroad involved. In this case, as in others, AAR can play a valuable role in bringing the railroad industry's perspective to the Court's attention.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

ROBERT W. BLANCHETTE *
Vice President-Law and
General Counsel
DANIEL SAPHIRE
General Attorney
ASSOCIATION OF AMERICAN
RAILROADS
American Railroads Building
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505
Counsel for Amicus

* Counsel of Record

November 7, 1996

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-358

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

JAMES L. CHITTUM,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Virginia

---

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 percent of the rail industry's line haul mileage, product 93 percent of its freight revenues, and employ 91 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and the administrative agencies in matters of common interest.

One such matter is the Federal Employers' Liability Act (FELA). In 1908, before enactment of any no-fault workers' compensation statutes in this country, Con-

gress structured a tort-based remedy for railroad employees injured on the job. Subsequently, every state has enacted a workers' compensation law, under which concepts of negligence have been eliminated and insurance type benefits are provided to injured workers.[1]

Each year several thousand FELA lawsuits are filed against AAR members, and many more claims are settled before a suit is filed. In 1995, for example, 5,790 lawsuits were brought.[2] AAR's members expend substantial sums of money defending FELA claims, and in the payment of FELA settlements and verdicts, far more, by any reasonable standard of comparison, than is spent by other industries in connection with compensating employees for work-related injuries.[3]

This case is of particular concern to AAR's members. The railroad defendant sought to introduce evidence demonstrating that plaintiff's future income would have been reduced by the deduction of railroad retirement taxes from his paycheck. It is AAR's understanding that FELA plaintiffs generally have not made this an issue, acknowledging that their wage loss would not include amounts deducted for railroad retirement taxes. How-

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[1] Seamen are covered under FELA by virtue of 46 U.S.C. § 688. All other industries in the United States are covered by either state or federal no-fault workers' compensation systems.

[2] ASSOCIATION OF AMERICAN RAILROADS, 1995 CLAIM & LITIGATION REPORT 3-3 (May 1996). (CLAIM AND LITIGATION REPORT). This report contains data on AAR member railroads' FELA experiences compiled from annual surveys.

[3] Private industry as a whole pays about $0.36 per employee hour worked under state workers' compensation, GENERAL ACCOUNTING OFFICE, INTERCITY PASSENGER RAIL: FINANCIAL AND OPERATING CONDITIONS THREATEN AMTRAK'S LONG-TERM VIABILITY 59 (1995), compared to nearly $2.00 for railroads. CLAIM & LITIGATION REPORT at 2-2. Over the past five years, AAR members have spent, on average $1.2 billion on FELA annually, or nearly 3.7 percent of their gross revenues. CLAIM & LITIGATION REPORT, (Calendar years 1991, 1992, 1993, 1994, 1995).

ever, by excluding this evidence, the Virginia court opened the door to FELA awards that far exceed plaintiffs' actual losses, which many FELA plaintiffs now undoubtedly will pursue. This has the potential substantially to increase the already high damages paid by railroads under FELA. Moreover, the prospect of compensation in excess of take home pay will hinder efforts to get injured rail employees back to work promptly.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in Petitioner's brief.

SUMMARY OF THE ARGUMENT

In *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490 (1980), this Court ruled that a defendant in FELA cases may introduce evidence of the effect of federal income taxes on the plaintiff's earnings. The Court reasoned that the plaintiff is entitled to recover damages for only the loss of wages that actually would have been received, and that that amount unquestionably is affected by the plaintiff's obligation to pay income taxes. This principle applies equally with respect to amounts plaintiff is obligated to pay in railroad retirement taxes. The ruling below, disallowing evidence of plaintiff's railroad retirement tax obligations, will result in overcompensation of FELA plaintiffs and increased liability against railroad defendants.

In addition to expanding railroad liability, the ruling below will hinder efforts to rehabilitate injured railroad employees. Allowing FELA plaintiffs to collect more money while they are off of work due to an injury than they would receive on the job will create an additional incentive for injured railroad employees to avoid rehabilitation and prompt return to employment.

ARGUMENT

I. THE FAILURE OF THE COURT BELOW TO FOLLOW THIS COURT'S *LIEPELT* DECISION WILL RESULT IN AN UNWARRANTED AND SUBSTANTIAL INCREASE IN RAILROAD LIABILITY UNDER FELA

In the ruling below, the Virginia Supreme Court ignored the teaching of this Court in *Liepelt*, transforming FELA into a compensation law that pays rail workers suffering an injury more money while disabled than they would earn back on the job.

FELA is a unique compensation law that permits railroad employees injured on the job to collect damages for both economic and noneconomic losses suffered.[4] In contrast, the workers' compensation systems that cover the vast majority of other American workers set limits on the amount of compensation that can be recovered for lost wages, and generally do not allow recovery of damages for pain and suffering.[5] Unlike FELA, however, the workers' compensation laws do not adjust awards to account for employer negligence and the contributory negligence of the employee.[6]

It clearly is not the purpose of FELA to make injured employees more than whole for their work-related injuries. Rather, with regard to wages lost as a result of a job-related injury, it is the intent of FELA that em-

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[4] While there are no limits on compensatory damages, FELA does not permit recovery for punitive damages. *Kozar v. Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238 (6th Cir. 1971); *Wildman v. Burlington Northern R.R. Co.*, 825 F.2d 1392 (9th Cir. 1987).

[5] U.S. CHAMBER OF COMMERCE, 1994 ANALYSIS OF WORKERS' COMPENSATION LAWS 22-25, Table VI (1994).

[6] Under FELA, the employer is liable for damages if the employers's negligence played a role in causing the injury, 45 U.S.C. § 51, however, damages are reduced in proportion to the employee's contributory negligence. 45 U.S.C. § 53.

ployees receive compensation for the actual pecuniary loss suffered. *Michigan Central R.R. Co. v. Vreeland*, 227 U.S. 59 (1913). Adhering to that principle, in *Liepelt*, this Court ruled that a FELA defendant is entitled to a jury instruction that any damages awarded the plaintiff are not subject to taxes, and to present evidence of the income taxes payable on the plaintiff's past and future income. This assists the jury in determining accurately the plaintiff's actual pecuniary loss when awarding damages for past and future lost wages. As the Court noted, "[i]t is his after tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family." 444 U.S. at 493.

There is absolutely no public policy reason why the principle applied by this Court in *Liepelt* with regard to income taxes should not apply with equal force to taxes paid to support the railroad retirement system.[7] In addition to income taxes, each rail employee and employer is subject to the Railroad Retirement Tax Act (RRTA).[8] There are two aspects of railroad retirement taxes, tier I and tier II, both of which are contributed to by the employer and employee. RRTA requires that the employer withhold from each employee's pay a specific percentage of compensation. For tier I, 7.65 percent of the employee's compensation, up to a threshold of $62,700, is withheld; for tier II, 4.9 percent of the employee's compensation, up to a threshold of $46,500, is withheld.[9]

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[7] The Railroad Retirement system is unique to the railroad industry. It provides benefits that are comparable to Social Security, as well as benefits not available to employees covered by the Social Security system.

[8] 26 U.S.C. § 3201 *et seq.*

[9] *See* 26 U.S.C. §§ 3201, 3202, 3231(e)(2) and 42 U.S.C. § 430. Of the 7.65 percent withheld for tier I taxes, 1.45 percent is earmarked for Medicare. While the employer and employee contribute equal shares under tier I, the employer pays about 77 percent of the tier II taxes. The compensation thresholds are adjusted each year.

The court below rejected the railroad's argument that under *Liepelt* the employee's obligation to pay these taxes, with its resultant reduction in take home pay, should be brought to the jury's attention by the defendant. In reaching this decision, the court offered nothing more than a summary conclusion that railroad retirement taxes have not been equated with income taxes by this Court. However, the court failed to consider the rationale behind the *Liepelt* decision.

The rationale that *Liepelt* applied to income taxes applies equally with respect to railroad retirement taxes. As with income taxes, the money paid in railroad retirement taxes is not available to rail workers to support themselves and their families. In fact, because there is no equivalent to tier II under the Social Security system, total deductions for railroad retirement taxes made from the wages of a rail employee are greater than the deduction for FICA taxes made from the wages of a Social Security employee at the same income level. Failing to take railroad retirement taxes into consideration when awarding compensation results in a windfall for the employee just as does failing to take income taxes into consideration. Moreover, unlike income taxes, which vary with each employee's individual circumstances, the amount of railroad retirement taxes to be paid by each worker is fixed, and therefore easily ascertainable. Thus, allowing introduction of evidence of railroad retirement taxes is less likely to result in "protracted expert testimony and debate" which the *Liepelt* Court recognized as a concern with income taxes. 444 U.S. at 494.

Under the ruling below, FELA juries in awarding damages will not know that plaintiffs typically have as much as 12.55 percent of their wage deducted to pay railroad retirement taxes. Consequently, it is almost inevitable that such plaintiffs will be given awards that exceed their actual take home pay.

The impact of denying rail defendants the ability to introduce evidence of railroad retirement taxes is significant. The average annual compensation of Class I rail employees in 1995 was $48,188.[10] During the last five years, the railroad industry closed a total of about 134,000 FELA cases in which a payment was made, paying out, on average, over $900 million annually.[11] While in many cases the employee returned to work promptly, substantial numbers of employees claimed significant wage loss as a result of their injuries. Many alleged that they were permanently disabled from returning to the workforce, and therefore entitled to wage loss compensation covering the remainder of their work lives.[12] If, as the Virginia court ruled, that compensation must include amounts that would have been deducted from wages for railroad retirement taxes, it will increase railroad liability significantly.

II. REFUSAL TO PERMIT INTRODUCTION OF EVIDENCE REGARDING THE IMPACT OF RAILROAD RETIREMENT TAXES WILL CREATE A DISINCENTIVE FOR EMPLOYEES TO RETURN TO THE JOB

Irrespective of the impact of the ruling below on railroad liability, there is another reason why this Court should review the Virginia court's decision. Failure to permit jury instructions and evidence related to the effect

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[10] Association of American Railroads, Railroad Facts 56 (1996 ed.). Class I railroads, which primarily constitute AAR membership, are those with annual revenues of $250 million or more. 49 C.F.R. pt. 1201, 1-1(a) (1995).

[11] CLAIM & LITIGATION REPORT at 2-1.

[12] Of about 10,000 FELA cases closed by four major railroads in 1994, the employee did not return to the job in about 1,300 cases. *See* GENERAL ACCOUNTING OFFICE, FEDERAL EMPLOYERS' LIABILITY ACT: ISSUES ASSOCIATED WITH CHANGING HOW RAILROAD WORK-RELATED INJURIES ARE COMPENSATED (August 1996). (GAO FELA Report).

of railroad retirement taxes is inconsistent with the important public policy goal of rehabilitating injured workers and returning them to productive employment.

One reason workers' compensation systems establish limits on wage loss benefits is the widely accepted view that if compensation matches or exceeds the employee's entire wage loss there will be little incentive to seek rehabilitation and to return to work promptly.[13] Because FELA permits full recovery of wage loss it already contains a disincentive for employees aggressively to pursue rehabilitation.[14] Under the ruling below, rail employees are in a position not merely to recover their full take home pay, but also to collect amounts that would be deducted from their paychecks had they returned to the job. Thus, the ruling below creates a perverse financial incentive for able workers to claim a disability and for injured workers to remain disabled as long as possible. Any incentive to complete rehabilitation and return to work surely will be further diminished if FELA enables rail workers to recover compensation that substantially exceeds their take home pay by remaining off the job.

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[13] Meyers, Viscusi & Durbin, *Workers' Compensation and Injury Duration: Evidence From a Natural Experiment*, 85 AMER. ECON. REV. 322 (1995); Burton, *Disabled Workers' Compensation Programs: Providing Incentives for Rehabilitation and Reemployment*, 8 JOHN BURTON'S WORKERS' COMPENSATION MONITOR (No. 4) 6 (1995) ("Most studies find that higher workers' compensation benefits lead to more workers' compensation claims and to longer duration of benefits . . . higher benefits result in more workers missing work for longer spells of time, which may conflict with the objective of rehabilitation.").

[14] *See* GAO FELA Report at 25.

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Supreme Court of Virginia in this case be granted.

Respectfully submitted,

ROBERT W. BLANCHETTE *
Vice President-Law and
General Counsel
DANIEL SAPHIRE
General Attorney
ASSOCIATION OF AMERICAN
RAILROADS
American Railroads Building
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505
Counsel for Amicus

November 7, 1996

* Counsel of Record

(3) 96-358

Supreme Court, U.S.
FILED
NOV 8 1996

In The Supreme Court Of The United States

OCTOBER TERM, 1996

NORFOLK AND WESTERN RAILWAY COMPANY,

Petitioner,

v.

JAMES L. CHUTTUM,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Byron P. Kloeppel*
Raymond H. Strople
John E. Basilone
MOODY, STROPLE & KLOEPPEL, LTD.
500 Crawford Street
Post Office Box 1138
Portsmouth, Virginia 23705
(757) 393-4093

Counsel for Respondent
****Counsel of Record***

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LAWYERS PRINTING COMPANY 7th & Franklin Bldg Richmond,Virginia 23219 (804) 648-3664

QUESTION PRESENTED

SHOULD A RAILROAD WHOSE NEGLIGENCE HAS CAUSED A PERMANENT, CAREER-ENDING INJURY TO AN EMPLOYEE BE PERMITTED TO REDUCE ITS FINANCIAL RESPONSIBILITY TO THAT EMPLOYEE BY DEDUCTING THE EMPLOYEE'S RAILROAD RETIREMENT PAYMENT TOWARD HIS RETIREMENT FROM THE EMPLOYEE'S GROSS INCOME TO DETERMINE HIS ECONOMIC LOSS?

PARTIES TO THE PROCEEDING

The only parties to this proceeding are Norfolk and Western Railway Company and James L. Chittum, generally known as Lynwood Chittum.

Norfolk and Western Railway Company is a Virginia corporation with its principal place of business in Norfolk, Virginia. Norfolk and Western Railway Company is a subsidiary of Norfolk Southern Railway Company, which is a subsidiary of Norfolk Southern Corporation.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

No. 96-358

NORFOLK AND WESTERN RAILWAY COMPANY,

Petitioner,

v.

JAMES L. CHITTUM,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

BRIEF IN OPPOSITION

This case involves a fairly simple, personal injury claim brought pursuant to the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* In the trial court, the jury returned its verdict in favor of James L. Chittum, and the judgment was affirmed on appeal.

Chittum was a welder, employed by Norfolk and Western, in Roanoke, Virginia. He sustained a career-ending injury while working on the "spike pile" in the Roadway Materials Yard. At the conclusion of the trial, the jury found in Chittum's favor on the fundamental issues of negligence, causation and foreseeability, and the judgment was affirmed by the Supreme Court of Virginia.

The only issue involved here is whether Norfolk and Western is going to be permitted to extend this Court's decision in *Norfolk and Western Ry. v. Liepelt*, 444 U.S. 490 (1980). The Railroad claims that *Liepelt* requires the admission of evidence of the employee's Tier I and Tier II payments toward his retirement for purposes of determining his economic loss. In context, the issue raised by Norfolk and Western involves only Chittum and the rest of the 213,000 employees currently engaged in the freight railroad industry.

Although the case necessarily involves a question of federal law because the claim arises under the Federal Employers' Liability Act, there is no conflict among federal circuit or state supreme courts; the decision of the Supreme Court of Virginia does not conflict with any precedent of this Court; and the case certainly does not present an important issue of federal law with significant practical consequences.

OPINION BELOW

The decision of the Supreme Court of Virginia, dated April 19, 1996, affirming the judgment of the Circuit Court of the City of Roanoke, which the Petitioner seeks to review, is reported at 251 Va. 408, 458 S.E.2d 877 (1996). The Supreme Court of Virginia denied rehearing on June 7, 1996, and that order is unreported. The decision and order are included in the Appendix to the Petition for a Writ of Certiorari.

JURISDICTION

Jurisdiction in the state trial court below, a court of general jurisdiction, was based on 45 U.S.C. § 51 *et seq*. The court exercised its concurrent jurisdiction over Chittum's federal claim. Jurisdiction in the Supreme Court of Virginia was based on § 8.01-670 of the Code of Virginia of 1950, as amended. The Petition for Writ of Certiorari was filed in the Court on or about September 8, 1996. The Petitioner seeks review, under 28 U.S.C. § 1257 and Rule 10(c) of the Rules of the Supreme Court of the United States, of the Virginia Supreme Court's Order denying further review.

STATUTE INVOLVED

The Federal Employers' Liability Act, 45 U.S.C. § 51, provides, in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States...shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of . . . such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

STATEMENT OF THE CASE

Lynwood Chittum filed this action against Norfolk and Western under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, to recover damages after he sustained a career-ending injury as a result of the Railroad's failure to provide him with a safe place to work. As it did in the trial court and on appeal to the Supreme Court of Virginia, Norfolk and Western has given itself a more favorable version of the facts than is justified by the jury verdict or by the record.

Chittum began working for Norfolk and Western in 1973, in the Engineering Department, doing hard physical labor. He was shot in a hunting accident in late 1973, and he remained paraplegic for some time.

With hard work and years of rehabilitation, Chittum was able to return to work in 1978, without any medical restrictions. He had some residual physical limitations, including a loss of sensation in his right foot. With the aid of metal foot and ankle supports attached to his shoes, Chittum worked regularly, although he walked with a limp.

In 1981, because of the neurological condition, Chittum did not feel a nail that came through the heel of his right boot. He discovered it at the end of the day when he took off the boot. Chittum went to a reconstructive surgeon who performed a split thickness skin graft at the site of the wound in his right heel. By January, 1982, Norfolk and Western's physician again authorized Chittum to return to work without restrictions. He worked at various jobs in Norfolk and Western's Engineering Department until June, 1991, when he was taken out of service by the Railroad's physician after the skin graft tore open and began bleeding.

Between 1982 and 1989, when he tore the skin graft for the first time, Chittum saw several doctors, including Norfolk and Western's physician, for various reasons, generally related to the residuals of the 1973 gunshot wound, and the resulting neurological problems. In 1989, Chittum tore the skin graft slightly when he twisted his right foot and ankle on some railroad spikes in Norfolk and Western's Roadway Materials Yard. His job at the time involved burning

open metal spike kegs that had been dumped in the "spike pile", with a blow torch and dumping the spikes on the ground, so they could be picked up and salvaged for use on other jobs. Chittum treated the initial tear himself, but in April, 1990, he returned to the surgeon because of shooting pains in his foot. The doctor determined that the problem was neurologic, rather than related to the condition of the skin graft, but he prescribed an arch support to help take the weight of Chittum's body off the site of the skin graft.

Chittum did well until April, 1991, when he tore the graft open again while he was working on the spike pile. Chittum was not able to take care of this tear as the reconstructive surgeon had taught him, so in early June, 1991, he returned to the physician. At that point, the graft was sufficiently damaged that the surgeon concluded Chittum needed another surgical repair. The surgeon did not tell him to stop working, so Chittum continued working for two weeks until he tore the wound open, again while working on the "spike pile," and it began bleeding for the first time. At that time, he was taken to the Railroad's physician who ordered him taken out of service. Chittum has not returned to work since then, and it is undisputed that he is not physically qualified to return to his regular railroad employment.

At the time of his injury, Chittum had slightly more than 120 months of credited railroad service, and because of the disability he will never acquire the 360

months of service required for a normal age and service pension from the United States Railroad Retirement Board.

The liability issue was hotly contested in the trial court and on appeal. Norfolk and Western claimed Chittum was working elsewhere during the time he tore the skin graft for the first time, and it vigorously challenged the sufficiency of Chittum's evidence on the issues involving negligence, causation and foreseeability, as well as the issue raised in Norfolk and Western's Petition.

During the trial, in order to calculate Chittum's net economic loss, Norfolk and Western proposed to deduct from his gross income, in addition to federal and state income taxes, the Railroad Retirement payments which Chittum himself made toward his retirement. On Chittum's objection, the trial court limited the Railroad's proof on the issue to federal and state income taxes, as contemplated by this Court's holding in *Norfolk and Western Ry. v. Liepelt*, 444 U.S. 490 (1980). The Railroad was not permitted to offer evidence that Chittum's gross wages would have been reduced by an additional 12.55% for payments mandated by the Railroad Retirement Tax Act, 26 U.S.C. § 3201.[1]

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[1]At the same time, the trial court did not permit Chittum to offer evidence of Norfolk and Western's RRTA payments, which

(continued...)

The trial court's decision on the issue was upheld by the Supreme Court of Virginia, which indicated that this Court "has never held that Tier I and Tier II payments toward retirement are to be treated the same as federal and state income taxes and, therefore, deducted to establish net income." 251 Va. at 416. The Supreme Court of Virginia did "not equate them [Tier I and Tier II payments] with income taxes."

REASONS FOR DENYING THE PETITION

Contrary to the assertions of Norfolk and Western's Petition, there is no compelling reason to grant a writ; nor is there any significant policy or social reason for the relief sought. On the contrary, the case involves nothing more than a defendant's effort to reduce its financial responsibility to an injured plaintiff, a question of damages in a personal injury case, even though the case does arise under the Federal Employers' Liability Act. There are no conflicting decisions from any of the eleven federal circuit courts which require resolution; there are no conflicting

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[1](...continued)
amount to 23.75% of an employee's gross wages, over the balance of his expected work life. The Railroad does not make these payments when the employee does not work, and this fact necessarily diminishes the amount of the pension Chittum would have received upon a normal age and service retirement from railroad service.

decisions from any of the various federal district courts which require resolution; and there are no conflicting decisions from the highest courts of any of the fifty states which require resolution.

Norfolk and Western's Petition misinterprets the holdings of several decisions in formulating its argument, and its reference to several cases based on other federal statutes which involve workers' compensation plans looks like an effort to compare elephants and frogs.

The reference to statistics on pages 7 and 8 of the Petition show how insignificant this case really is in the overall picture of the business of this Court. According to the statistics given, the 213,000 employees in freight railroad industry comprise less than one-tenth of one percent of the population of the United States, and of that number, less than three percent filed FELA suits in the year cited. There is no way to know how many of these cases involve occupational hearing loss and asbestos claims which generally do not involve lost time or lost wages.

When the decision of the Supreme Court of Virginia is evaluated in light of these considerations, it is clear that Norfolk and Western's Petition should be denied.

I.

THE DECISION OF THE SUPREME COURT OF VIRGINIA DOES NOT CONFLICT WITH ANY FELA DECISION OF THIS COURT OR THE DECISION OF THE APPELLATE COURT OF ILLINOIS

Contrary to the assertions of the Petition, this Court's opinion in *Norfolk and Western Ry. v. Liepelt*, 444 U.S. 490 (1980) does not require that an injured railroader's Tier I and Tier II payments toward his retirement be deducted from his gross income for the purpose of determining his economic loss. It is certainly true that questions concerning the measure of damages in cases brought pursuant to the Federal Employers' Liability Act are federal in character and, therefore, are governed by federal law. *Monessen Southwestern Railway v. Morgan*, 486 U.S. 330 (1988), *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485 (1916), *Michigan Central R.R. v. Vreeland*, 227 U.S. 59 (1913). However, not one decision from this Court or any of the federal circuit courts has ever held that in an FELA case, an injured employee's own railroad retirement payments should be deducted from his gross income.

Although N&W cites *Norfolk & Western Ry. v. Liepelt, supra*, as authority for its position, the decision does not provide the authority N&W claims. In *Liepelt*, the issues were "(1) whether it was error to

exclude evidence of the income taxes payable on . . . past and estimated future earnings; and (2) whether it was error . . . to refuse to instruct the jury that the award of damages would not be subject to income taxation." *Ibid* at 491. This Court held that a railroad is entitled to introduce evidence of the income taxes payable on past and estimated future lost earnings, and that it was error to refuse the requested instruction that the damage award was not subject to income taxes.

Shortly after *Liepelt*, this Court noted that its holding that an FELA defendant is entitled to have juries instructed that damage awards are not subject to income tax "articulated a federal common-law rule." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 (1981). The explanation that "[t]he purpose was to eliminate from the deliberations of juries 'an area of doubt or speculation that might have an improper impact on the computation of the amount of damages,'" 453 U.S. at 487, makes it perfectly clear the reasoning was to avoid the danger that juries would increase their verdicts sufficiently "so that plaintiff would get what they think he deserves after the imaginary tax is taken out of it." 444 U.S. at 497.

From the argument in its Petition, it is clear that Norfolk and Western has simply misinterpreted this Court's decision in *Liepelt*. *Liepelt* was a wrongful death case, and in that case, the measure of damages was and is limited to "the damages [that] flow from the deprivation of the pecuniary benefits which the

beneficiaries might have reasonably received if the deceased had not died from his injuries." *Michigan Central R.R. v. Vreeland*, 227 U.S. at 70. In a wrongful death case under the FELA, there can be no recovery for the beneficiary's loss of love and affection, mental anguish or loss of society and companionship.

According to the evidence in *Liepelt*, the beneficiary's pecuniary loss, to the expected date of the decedent's retirement, when reduced to present value at the time of trial was approximately $302,000.00, but the verdict was $775,000.00. There was nothing in the opinion in *Liepelt* to indicate any impact on the amount of the decedent's expected pension from the date of his expected retirement through the remainder of his life expectancy. On the basis of the opinion in *Liepelt*, however, Norfolk and Western has suggested that the measure of damages for an injured employee, such as Lynwood Chittum, is limited to pecuniary loss, and that is simply wrong. Norfolk and Western has concluded that "a disabled employee injured by the employer's negligence is entitled to lost wages." Petition, p.5. The Railroad goes on to claim that this Court "has repeatedly articulated the principle that an injured plaintiff . . . is entitled to recover compensation for 'the damages . . . [that] flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received.'" Petition, p.8. In the context of someone like Lynwood Chittum who has sustained a disabling, career-ending

injury, but who is still alive, the premise is simply wrong, even though it would be correct if he had been killed.

An employee like Lynwood Chittum who has been rendered disabled as a result of the Railroad's negligence is entitled to recover for past and future lost wages and fringe benefits, reduced to present value, pain and suffering and any diminution of retirement benefits caused by the injury. *See Boston & Maine R. R. v. Talbert*, 360 F.2d 286 (1st Cir. 1966).

The difference in the measure of damages for a personal injury case as opposed to a wrongful death case has apparently led to Norfolk and Western's confusion on the issue, as a brief analysis of *Liepelt* will demonstrate. In *Liepelt*, N&W argued that "the jury must have assumed that its award was subject to federal income taxation," 444 U.S. at 492, because the verdict exceeded the decedent's projected total economic loss, when discounted to present value, by more than two and one-half times. In the context of a wrongful death case where the measure of damages is limited to pecuniary loss as described in *Michigan Central R. R. v. Vreeland*, *supra*, and where the amount of the verdict cannot exceed the pecuniary loss, the argument makes sense. However, in the context of a disabling injury, the argument ignores several important elements of damages.

In the context of a wrongful death case, the holding in *Liepelt* is understandable, because we all pay federal and state income taxes to support our fair share of the cost of government. The decedent in *Liepelt* would have paid those income taxes had he not been killed. He would have received the same benefit from the payment of those income taxes as any other taxpayer, including a railroad employee who was rendered permanently disabled as a result of his employer's negligence.

In the case of a railroad employee like Lynwood Chittum, who was medically disabled and unable to return to work at his regular occupation because of his employer's negligence, the implications are significant. Chittum acknowledges that he would have had to pay federal and state income taxes from his railroad income had he not been injured. He does not acknowledge, however, that Norfolk and Western is, or should be, entitled to benefit from his inability to make further payments toward his pension.

The Railroad Retirement Act of 1974, 45 U.S.C. § 231b indicates that the amount of a railroad pension is directly related to the employee's highest sixty months of compensated service and the employee's total credited railroad service. Railroaders are eligible for a normal age and service pension when they reach age 62 and accrue 360 months of credited railroad service, but the average age of retirement is sixty-three (63) years. When he last worked, in 1991,

Lynwood Chittum was 37 years old, and he had only slightly more than ten years of credited railroad service. He would not have been eligible for a normal age and service pension for another twenty-five years, but because of the disability, he will never accrue the 360 months necessary for a normal retirement pension. Because of the effect of two different national contracts that have been implemented since Chittum went out of service, there have been or will be several incremental pay increases totalling 24 percent of the basic pay rate from July, 1991, through July, 1999. It is reasonable to expect that Chittum would have benefitted from these and similar pay increases over the twenty-five years he would have been required to work, had he not been injured, before he would have been eligible for a retirement pension. Had he been able to continue working until normal retirement, he would necessarily have been eligible for a significantly larger retirement annuity.

Because of his disability, Chittum will never receive a single additional month of credited railroad service to increase the amount of the disability annuity he now receives, and he will never get the benefit of the pay increases that have become effective since he has been unable to work, to increase the amount of his pension. Under the circumstances, deducting the Tier I and Tier II contributions which Chittum, as an employee, made toward his railroad retirement pension will effectively increase his economic loss.

Although Norfolk and Western has claimed that the decision of the Supreme Court of Virginia "squarely conflicts" with *Oltersdorf v. Chesapeake & Ohio Ry.*, 404 N.E.2d 320 (Ill. App. 1980), cert. denied 450 U.S. 920 (1981), an examination of the opinion does not support the Railroad's contention. The defendant offered to prove a net future economic loss which included the consideration of railroad retirement taxes among other things, 404 N.E.2d at 324, but the trial court refused a proposed jury instruction that was essentially the same as that considered by this Court in *Norfolk and Western Ry. v. Liepelt*, *supra*. The Appellate Court of Illinois noted that in *Liepelt*, this Court "held that 'the wage earner's income tax is a relevant factor in calculating the monetary loss suffered . . .'" 404 N.E.2d at 325. The court went on to hold that "the trial court erred in refusing to allow evidence of the impact of taxation on plaintiff's lost future earnings . . . , " *id.* and for refusing to grant the proposed instruction which related only to "income" taxes. There is certainly nothing in the opinion which indicates a railroad is entitled to subtract railroad retirement payments by the employee in order to determine the employee's past and future economic loss.

At the time of the *Liepelt* decision, the Railroad Retirement Tax Act, 26 U.S.C. § 3201 *et seq.*, with its two-tiered provisions for funding the retirement pensions of railroaders, had been in effect for years. The Tier I and Tier II payments were, and had been,

regular payroll deductions, along with income taxes, but there is nothing in *Liepelt* to suggest that the Tier I and Tier II payments should have been treated like income taxes. The decision in *Liepelt* was limited to the issue of income taxes, and since *Liepelt*, this Court has never expanded its holding to include a worker's Tier I and Tier II payments as N&W now requests. In this respect, it is noteworthy that in several cases decided since *Liepelt*, *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983),[2] *St. Louis Southwestern Ry. v. Dickerson*, 470 U.S. 409 (1985) and *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330 (1988), this Court considered issues that involve damages in FELA cases but did nothing to extend its holding in *Liepelt*, even though the opportunity appears to have been present. In fact, there does not appear to be any published opinion in an FELA case which holds that a railroad is entitled to offer evidence of an employee's Tier I and Tier II contributions toward his retirement in order to reduce the employee's past or future economic loss, or that a railroad is entitled to a jury instruction that an award of damages would not be subject to the employee's Tier I and Tier II payments toward retirement.

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[2]This case was brought under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, but the treatment of reducing future economic loss to present value has been generally applied to FELA cases. *Chesapeake & Ohio Ry. v. Kelly*, *supra*.

It is significant that no federal or state court has held that an injured railroader's Tier I and Tier II payments toward his retirement should be deducted from gross income to determine economic loss. The fact is that none of the cases cited by N&W in its argument on the issue support the Railroad's position. However, the Supreme Court of Virginia is not alone in holding that railroad retirement taxes are not the same as federal and state income taxes. The precise issue was before the Court of Appeals of Georgia in *CSX Transportation, Inc. v. Levant*, 200 Ga. App. 856, 410 S.E.2d 299 (1991), *rev'd on other grounds*, 262 Ga. 313, 417 S.E.2d 320(1992). In discussing the issue, the Court of Appeals stated:

> The taxes paid by plaintiff into the railroad retirement fund are to fund his future retirement and are paid directly to him upon his retirement. Since the railroad retirement taxes would ultimately be paid directly to plaintiff upon his retirement, we find no error with the trial court's refusal to instruct the jury that plaintiff's net income means gross income minus all taxes including railroad retirement taxes.

Recently in *Maylie v. National Railroad Passenger Corp.*, 791 F. Supp. 477 (E.D. Pa. 1992), *aff'd.* 983 F.2d 1051 (3d Cir. 1992), the District Court concluded that "no deduction would be allowed from

plaintiff's gross income for railroad retirement taxes." 477 F. Supp. at 487. In support of its argument, Amtrak cited *Rachal v. Ingram Corp.*, 795 F.2d 1210 (5th Cir. 1986) and *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475 (5th Cir. 1984), but the court rejected the argument with the following comment:

> The value that the jury placed on plaintiff's lost future wages and benefits, therefore, did not include the value of his lost railroad retirement pension. It would be inappropriate to deduct from plaintiff's lost salary taxes that, in effect, represented plaintiff's contribution toward a pension without including, as an item of damages, the value of that pension. Because defendant did not consent to inclusion of the value of the pension as an item of damages, it was not error to refuse to reduce plaintiff's lost wages by the amounts he would have had to pay in railroad retirement taxes.

Another case cited by Norfolk & Western, *Marynik v. Burlington Northern, Inc.*, 317 N.W.2d 347 (Minn. 1982), likewise dealt with the issue of a *Liepelt* instruction. The instruction was granted in this case, so the Railroad's comments about *Marynik* are not relevant to the issue here.

The decisions in these cases are all consistent with the decision of the Supreme Court of Virginia in *Norfolk and Western v. Chittum*, and there is no valid reason for treating this case differently, particularly since there are no FELA decisions supporting the Railroad's position.

Since *Liepelt*, this Court has neither extended nor otherwise changed the applicable law on the matter of discount to present value and related damage issues, including appropriate deductions from gross income to determine economic loss. The holding in *Liepelt*, as subsequently developed in *Pfeifer, Dickerson* and *Monessen Southwestern Ry.*, is still the law. This Court has never held that Tier I and Tier II payments toward an injured railroader's retirement are to be treated the same as federal and state income taxes and deducted from gross income to establish the injured worker's net economic loss. There is simply no authority for N&W's position or its reliance on *Liepelt* and other cases to justify its position that it should have been permitted to offer evidence of Chittum's Tier I and Tier II payments toward his retirement or otherwise reduce his economic loss by those payments. The decision of the trial court on this issue was correct and there is no basis to now extend *Liepelt* beyond the plain language of the opinion.

II.

THE DECISION OF THE SUPREME COURT OF VIRGINIA IS NOT INCONSISTENT WITH ANY DECISION OF ANY FEDERAL COURT DECISION IN A NEGLIGENCE OR TORT STATUTORY SCHEME WITH RESPECT TO THE DEDUCTION OF SOCIAL SECURITY TAXES FOR PURPOSES OF DETERMINING ECONOMIC LOSS

In the absence of any decision from this Court, or any of the federal circuit or district courts, indicating that in an FELA case, a defendant railroad is entitled to deduct the employee's Tier I and Tier II RRTA contributions from gross income, Norfolk and Western has suggested that several decisions involving Social Security taxes under other federal statutes compel the same handling in an FELA case.

It is true that several decisions from the United States Court of Appeals for the Fifth Circuit have held that Social Security taxes should be deducted from gross income in cases under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* and one case under the Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.* The problem is that these statutes are not really analogous in the context of this or any other FELA case involving a disabling, career-ending case. The LHWCA is a workmen's compensation statute which has a totally different basis

for compensating an injured worker than the FELA. For a worker covered by LHWCA who has a permanent impairment, his compensation is payable "during the continuance of such total disability", 33 U.S.C. § 908(a) or "during the continuance of such impairment." 33 U.S.C. § 908(c)(23). Because this compensation continues through his entire lifetime, there is no reason to be concerned about subtracting Social Security taxes. The compensation award will take the place of the injured worker's Social Security pension. Similarly, in the case of a death claim under LHWCA, the compensation payments continue "during widowhood, or dependent widowerhood." 33 U.S.C. § 909(b). Again, the compensation award continues in effect and takes the place of the Social Security pension.

With respect to the comparison to the Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.*, the analogy is likewise inappropriate. Apart from the maritime nature of the statute, the measure of damages in DOHSA cases is limited to pecuniary loss, as are wrongful death cases, as discussed in *Norfolk & Western Ry. v. Liepelt, supra.* See 46 U.S.C. App. § 762. DOHSA cases are simply not analogous to permanent impairment or disability cases under the FELA.

In support of its position, N&W has cited several decisions, including *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475 (5th Cir. 1984) and *Rachal*

v. Ingram Corp., 795 F.2d 1210 (5th Cir. 1986), which it suggests compel the conclusion that an employee's Tier I and Tier II payments should be deducted from gross income to determine economic loss. However, an examination of these decisions and the authorities upon which they are based, as well as other case law, demonstrates that these cases are not as authoritative as N&W suggests.

Madore is part of a series of decisions by the United States Court of Appeals for the Fifth Circuit that deal with such issues as future economic loss, gross and net wages and discount to present value. *Rachal* is a Jones Act case from the Court of Appeals for the Fifth Circuit, and except for the final sentence, it deals primarily with the right to a jury trial. In the last sentence, the Court stated: "Finally, the district court properly subtracted FICA taxes under *Madore v. Ingram Tank Ships, Inc.* . . . " 795 F.2d at 1218.

In *Madore*, the Court of Appeals referred to *Liepelt* and its own decision in *Culver v. Slater Boat Co.* 688 F.2d 280 (5th Cir. 1982) *[Culver I]* as authority for its position that "the lost income stream must be computed after deducting the income taxes and Social Security taxes the worker would have paid had he continued to work." *Madore, supra* at 479. In *Culver I*, the Court of Appeals' reference to the deductibility of Social Security taxes was made only in the context of a hypothetical situation related to the primary issue of discounting future economic loss to

present value. 688 F.2d at 302. By the time of the *Madore* decision, though, the Court of Appeals had withdrawn the applicable part of *Culver I* by its decision in *Culver v. Slater Boat Co.*, 722 F.2d 114, 123 (5th Cir. 1983) *[Culver II]*. *Culver I* applied only to cases tried after September 22, 1982 and before December 22, 1983. 732 F.2d at 477.

After the Court of Appeals' decision in *Culver II*, the authority on which *Madore* was based was withdrawn, and there have been no other decisions which have suggested that *Madore* has any applicability beyond the date of *Culver II*. Significantly, *Culver II* made no suggestion that Social Security taxes should be deducted from gross income in the determination of an injured worker's economic loss, when it specifically withdrew the portion of *Culver I* which contained the hypothetical referencing to Social Security taxes, and on which *Madore* was based. 722 F.2d at 123. The Court of Appeals for the Fifth Circuit has never resurrected *Culver I*.

With respect to the decision in *Rachel v. Consolidated Rail Corp.*, 891 F. Supp. 428 (N.D. Ohio 1995), to which Norfolk and Western has referred, the authority cited was the already undermined opinion in *Madore*, *supra*. It is equally significant that in *Rachel* the issue was not whether Tier I and Tier II payments should be deducted from gross income to determine economic loss. The issue in *Rachel* was whether the Tier I and Tier II payments

were a fringe benefit which an injured worker was entitled to claim as a lost fringe benefit for which the Railroad was responsible. 891 F. Supp. at 430. The district court declined to permit the worker's economist to testify that the Tier I and Tier II payments of both parties constituted a fringe benefit for which the plaintiff should be compensated. Clearly, *Rachel* does not support the position suggested by N&W here.

It is significant that Norfolk and Western has made no reference to the Federal Tort Claims Act, 28 U.S.C. § 2674, a statute that is more analogous to the Federal Employers' Liability Act than the compensation statutes cited by the Railroad. According to the FTCA, damages against the United States are determined by state law "in the same manner and to the same extent as a private individual under like circumstances . . . . " except that the United States cannot be held liable for prejudgment interest or punitive damages. See *Flannery v. United States*, 718 F.2d 108 (4th Cir. 1983). Predictably, *Flannery* held that "federal income taxes must be deducted in computing lost future earnings . . . ," 718 F.2d at 111, because those taxes were considered punitive in nature, because the plaintiff would have had to pay these taxes had he not sustained the injury. However, there was no suggestion that Social Security taxes be deducted as well. *Flannery* arose in West Virginia, and under West Virginia law, there is no deduction from gross income in determining an injured plaintiff's economic loss. *Flannery v. United States*, 297 S.E.2d 433

(W.Va. 1982). Clearly, *Flannery* would have been the perfect place for holding that Social Security taxes should be deducted from gross income in cases under the Federal Tort Claims Act, had the Court of Appeals for the Fourth Circuit deemed it appropriate.

Applying the FTCA rule to Virginia, an injured person's federal and state income taxes would clearly be deducted from his or her gross income loss, but Social Security taxes would not be deductible. In *Hoge, Admir. v. Anderson*, 200 Va. 364, 106 S.E.2d 121 (1958), the Supreme Court of Virginia indicated that in computing damages, the appropriate figure was "gross earnings" rather than "net or 'take home pay.'" 200 Va. at 368. It is clear, then, that had Lynwood Chittum sustained the same disabling injury as a consequence of the negligence of an agent or employee of the United States, his gross income would have been reduced by the amount of his federal and state income taxes, but not by any railroad retirement taxes. There is certainly no reason why Norfolk and Western should benefit by a reduction of Chittum's gross income loss by the amount of railroad retirement contributions he would have made, when in a similar case brought under the Federal Tort Claims Act, the United States would not be entitled to a deduction from gross income for those amounts.

When this Court considers the fundamental difference between the entire statutory scheme of cases decided under the Longshore and Harbor Workers'

Compensation Act, and the situation involving a permanently disabled railroad employee making his claim under the Federal Employers' Liability Act, it is clear that the Railroad should not be permitted to deduct the employee's railroad retirement payments from his gross income for purposes of determining his total economic loss. The cases cited by Norfolk and Western simply have no relationship to the injured railroader whose pension will never reach the level it would have, had he not been injured.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Byron P. Kloeppel*
Raymond H. Strople
John E. Basilone
MOODY, STROPLE & KLOEPPEL, LTD.
Post Office Box 1138
Portsmouth, Virginia 23705
(757) 393-4093
Counsel for Respondent

November 8, 1996

*Counsel of Record

Supreme Court, U.S.
FILED
NOV 20 1996
CLERK

No. 96-358

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

JAMES L. CHITTUM,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Virginia

REPLY BRIEF OF PETITIONER

CARTER G. PHILLIPS *
NATHAN C. SHEERS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Petitioner

* Counsel of Record

November 19, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF OF PETITIONER

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1. Contrary to its obvious intent, the opposition filed by respondent, James Chittum, concretely demonstrates why it is of such vital importance for the Court to grant review in this case and end the state court practice of applying state law to the recovery of damages under the Federal Employers' Liability Act ("FELA"). Respondent does not contest that FELA was intended to " 'create uniformity' . . . with respect to railroads' financial responsibility for injuries to their employees." *Norfolk & W. Ry.* v. *Liepelt*, 444 U.S. 490, 493 n.5 (1980) (quoting H.R. Rep. No. 1386, 60th Cong., 1st Sess. 3 (1908)). Moreover, respondent readily concedes that "the measure of damages in cases brought pursuant to [FELA] are federal in character and, therefore, are governed by federal law." Opp. 10 (citations omitted); see Pet. 7 ("the need for uniform national policy renders the calculation of damages pursuant to FELA a substantive issue of federal

law") (citation omitted). Respondent, nevertheless, concludes his opposition by taking the astonishing position that it was proper for the Supreme Court of Virginia to rely on *state* law to compute damages based on "gross earnings" rather than "net or 'take home pay.' " Opp. 26 (citing *Hoge* v. *Anderson*, 106 S.E.2d 121 (Va. 1958)); see also R. 460 (THE COURT: "The Supreme Court of Virginia has held as a matter of Virginia law that so-called take-home pay or net pay is no proper matter for consideration by the jury").

In its petition, however, petitioner demonstrated that under federal law FELA awards are to be based on " 'realistic measures' " of future income calculated from " 'after-tax income, rather than [from] . . . gross income.' " Pet. 8 (quoting *Liepelt*, 444 U.S. at 493). Respondent provides no reason—other than demonstrably inapplicable Virginia law—as to why the admitted 12.55% reduction in Chittum's net income for mandatory federal railroad retirement taxes should not be considered at all by the jury in calculating his future income stream. Instead, respondent attempts to minimize the significance of the damages miscalculation engaged in by the court below by pointing out—presumably without humorous intent—that this issue "involves only Chittum and the rest of the 213,000 employees currently engaged in the freight railroad industry." Opp. 2. Thus, by respondent's own characterization, the issue is of national importance and warrants this Court's review. See also Brief of Association of American Railroads as Amicus Curiae.

2. Petitioner has not "misinterpreted" this Court's decision in *Liepelt* as respondent asserts. Opp. 11. Respondent suggests that petitioner's alleged misinterpretation is based on the distinction between damages recoverable in a wrongful death action and in a personal injury case. Opp. 13. However, that distinction has no bearing whatsoever on the holdings in *Liepelt* (a wrongful death case) and *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U.S. 523

(1983) (a personal injury case) with respect to how future income streams are to be calculated. While damages in the two types of cases are "similar but not identical," this Court has recognized that the problems in determining awards for diminution of future income streams are "the same in both types of actions." *Id.* at 533 n.8. Respondent's invented distinction from *Liepelt* cannot negate the fact that the jury in this case was permitted to hear *no* record evidence of the significant and readily identifiable impact of railroad retirement taxes on Chittum's future income.[1]

Furthermore, while respondent asserts that only "income taxes" were at issue in *Liepelt*, respondent does not dispute that railroad retirement taxes are clearly federal taxes on income. Pet. 9 (citing *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 582 (1979); 26 U.S.C. § 3201). There is no reasoned distinction between the two types of income taxes for purposes of calculating future income streams. More importantly, however, it is clear from *Liepelt* and *Pfeifer* that the applicability of this Court's decisions is not limited to whatever may be labeled "income taxes." Rather, any avoided costs should be deducted from the claimant's future income stream. *Pfeifer*, 462 U.S. at 534 ("unreimbursed costs, such as transportation to work and uniforms . . . should also be deducted in estimating the lost stream").

Respondent simply provides *no* explanation as to how such costs can be excluded consistent with his suggested limitation of deductions from gross income to "income taxes" or why Chittum is not overcompensated by recov-

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[1] On the other hand—contrary to the impression created by respondent, Opp. 15—the jury *was* presented with evidence of Chittum's likely future pay increases, R. 292A-292E, as well as his inability to increase the retirement pension annuity he would receive after his disability annuity expired, R. 399-401. Thus, the record insured that the jury's estimate of Chittum's future income stream would be significantly inflated.

ering the 12.55% of his income that he concededly never would have received had he been able to work. The petition does not ask the Court to expand *Liepelt*; it requests the Court to stop state courts from narrowing it.[2]

3. Respondent does not contest the similarities between Social Security taxes and railroad retirement taxes. See Pet. 11-12. Instead, respondent argues that the statutory schemes under which Social Security taxes have been excluded from future income stream calculations are "not really analogous in the context of this or any other FELA case involving a disabling, career-ending" injury. Opp. 21. This distinction between personal injury and wrongful death cases is irrelevant in this context as demonstrated above. Moreover, several of the cases cited by petitioner requiring the exclusion of Social Security taxes from future income streams involved disabled claimants. See *Rachal* v. *Ingram Corp.*, 795 F.2d 1210, 1218 (5th Cir. 1986) (Jones Act); *Madore* v. *Ingram Tank Ships, Inc.*, 732

[2] *CSX Transportation, Inc.* v. *Levant*, 410 S.E.2d 299 (Ga. App. 1991), *rev'd*, 417 S.E.2d 320 (Ga. 1992), quoted at length by respondent, Opp. 18, does not support respondent's argument that another state has adopted the position of the Supreme Court of Virginia. Instead, the decision demonstrates that another state court has ignored this Court's direction in yet another FELA matter. *Compare CSX*, 410 S.E.2d at 303 (refusing to admit evidence on basis that "taxes paid by plaintiff into the railroad retirement fund are to fund his future retirement and are paid directly to him upon his retirement") *with Hisquierdo*, 439 U.S. at 575 (railroad retirement benefits "are not contractual" and "Congress may alter, and even eliminate, them at any time"); *see also* Pet. 14 (discussing *Marynik* v. *Burlington N., Inc.*, 317 N.W.2d 347 (Minn. 1982)).

Oltersdorf v. *Chesapeake & Ohio R.R.*, 404 N.E.2d 320 (Ill. App. Ct.), *appeal denied*, (Ill. Sept. 29, 1980), *cert. denied*, 450 U.S. 920 (1981), on the other hand, properly reversed a trial court that refused to allow proof of the effect of railroad retirement taxes. Respondent's attempt to distinguish the case is disingenuous. The evidence on "the impact of taxation" the trial court refused to allow, *id.* at 464, clearly refers to the railroad's proffer on the effect of "Federal income taxes, state income taxes and railroad retirement taxes," *id.* at 463, on the claimant's income.

F.2d 475, 478-79 (5th Cir. 1984) (same); *Hernandez* v. *M/V Rajaan*, 841 F.2d 582, 587-88 & nn.2-3 (5th Cir.) (LHWCA), *other section of opinion corrected*, 848 F.2d 498 (5th Cir.), *cert. denied sub nom. Dianella Shipping Corp.* v. *Hernandez*, 488 U.S. 981 (1988).

The Jones Act, as demonstrated in the petition, is clearly analogous to FELA. Pet. 12. The Jones Act explicitly states that "all statutes . . . modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." 46 U.S.C. App. § 688(a); see also *American Dredging Co.* v. *Miller*, 114 S. Ct. 981, 989-90 (1994). Perhaps this is why respondent ignores it completely. Nevertheless, on the basis of the Jones Act analogy alone, it is clear that Social Security and similar taxes should be excluded from calculations of future income streams under federal remedial schemes, such as FELA.

Respondent's tortured history of the *Culver* case, Opp. 23-24, does nothing to reduce the relevance of this issue under the LHWCA. Respondent's claim that no other court of appeals decision applies *Madore* beyond the date of *Culver* v. *Slater Boat Co.* (*"Culver II"*), 722 F.2d 114 (5th Cir. 1983), Opp. 24, is belied by *Hernandez*, 841 F.2d at 587-88 & nn.2-3, a decision cited by petitioner and expressly based on *Culver II*, which respondent wholly ignores.[3]

Without question, this case provides an effective vehicle by which the Court can ensure uniformity in the treatment of retirement taxes in measuring damages under several related federal remedial schemes that follow the FELA model. Accordingly, review by this Court of the dam-

[3] While respondent asserts that the LHWCA is not analogous to FELA, Opp. 21-22, respondent concedes the point of petitioner's argument with respect to the statute, *i.e.*, that "the treatment of reducing future economic loss to present value [in LHWCA cases] has been generally applied to FELA cases." Opp. 17 n.2 (citation omitted).

ages issue presented by petitioner, which arises in virtually every case involving federally mandated compensation under these myriad schemes, is particularly appropriate here. See *Begier* v. *IRS*, 496 U.S. 53, 57 n.2 (1990). In fact, beyond these cases ultimately resolved in various state courts, this damage calculation will affect virtually every settlement negotiation under these statutes and, if the issue of the effect of retirement taxation is left unclear, could discourage many parties from reaching settlement.

4. Finally, respondent chides petitioner for not referring the Court to the Federal Tort Claims Act, 28 U.S.C. § 2674 ("FTCA"), the one statutory scheme respondent asserts is analogous to FELA. Opp. 25. The FTCA, however, was not cited simply because it is *not* analogous. The FTCA is simply the waiver of sovereign immunity by the United States for certain existing causes of action. See, *e.g.*, *Rayonier Inc.* v. *United States*, 352 U.S. 315, 319 (1957) ("the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred"). It does not create a separate statutory cause of action. As a consequence, unlike FELA actions where—as respondent concedes, Opp. 10—federal law governs the issue of damages, state law controls that issue in FTCA cases. See, *e.g.*, *Molzof* v. *United States*, 502 U.S. 301, 305 (1992) ("the extent of the United States' liability under the FTCA is generally determined by reference to state law").

Respondent's reliance on the FTCA is telling. Respondent seeks to evade the application of uniform national law on the issue of damages under FELA and to overrecover for his injuries under Virginia law. This is precisely the type of variable financial responsibility and burden-shifting that FELA is supposed to curtail by establishing federal liability standards for railroads that are applicable in whichever state a claimant chooses to bring his or her action. *Liepelt*, 444 U.S. at 493 n.5 (quoting H.R. Rep.

No. 1386, 60th Cong., 1st Sess. 3 (1908)). The decision of the Virginia Supreme Court mandating the exclusion of evidence demonstrating that respondent's future income stream would have been reduced by the payment of compulsory railroad retirement taxes on income detrimentally biases the remedial effect of FELA and, by respondent's own reckoning, has the potential to affect hundreds of thousands of other claims involving FELA, as well as other analogous federal statutory schemes that respondent fails to distinguish. As a result, this case presents a significant and recurring question of federal law warranting this Court's review.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS *
NATHAN C. SHEERS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Petitioner

November 19, 1996

* Counsel of Record